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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1976

No.

**76-1606**

CONSUMERS UNION OF UNITED STATES, INC.  
and EDWARD J. GORIN,

*Appellants,*

v.

JOHN G. HEIMANN, Superintendent of  
Banks of the State of New York,

*Appellee.*

On Appeal from the United States District Court  
for the Southern District of New York

**JURISDICTIONAL STATEMENT**

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On Appeal from the United States District Court  
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**JURISDICTIONAL STATEMENT**

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This appeal involves the question of whether New York may arbitrarily prohibit consumers who neither reside nor regularly work in New York from purchasing low-cost commercial life insurance sold by savings banks in New York. New York's prohibition raises the most fundamental constitutional questions under the "Privileges and Immunities" clause of Article IV, Section 2, and the Commerce clause, questions to which this Court should give plenary consideration.

### OPINION BELOW

The opinion of the District Court is officially reported at 427 F.2d 840. It is set forth at pages 1a through 18a of the Appendix to this Jurisdictional Statement (hereinafter "App.").

### JURISDICTION

This action challenged the constitutionality of Section 268 of the Banking Law of New York on the grounds that it violates the Privileges and Immunities clause of Article IV, Section 2, and the Commerce clause, and Section 266 of the Banking Law of New York on various constitutional grounds. A three-judge court was convened pursuant to 28 U.S.C. § 2281, and that court rendered its decision on February 25, 1977, granting summary judgment in favor of the defendant. On March 18, 1977, appellants filed a notice of appeal in the District Court from that portion of the judgment which sustained the constitutionality of Section 268 of the Banking Law of New York.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1253.

### STATUTE INVOLVED

Section 268 of the Banking Law of New York, the constitutionality of which is at issue in this case, provides:

No application for [savings bank life] insurance shall be accepted except from a resident of this state or a person working regularly therein.

(4 McKinney 200).

### QUESTION PRESENTED

Does Section 268 of the Banking Law of New York, by flatly prohibiting non-residents of New York who do not regularly work there from purchasing low-cost savings bank life insurance, violate appellants' rights to enjoy the privilege of New York citizens to purchase such insurance and to enjoy the unrestricted flow of interstate commerce?

### STATEMENT OF THE CASE

#### A. Facts<sup>1</sup>

Article VI-A of the Banking Law of New York authorizes any savings bank in New York to sell life insurance (hereinafter "savings bank life insurance" or "SBLI") by creating a life insurance department. Once established, a life insurance department may conduct the business of life insurance "with all the rights, powers, and privileges and subject to all the duties, liabilities and restrictions relating to domestic legal reserve life insurance companies conferred or imposed by the insurance law, so far as the same are applicable and except as is otherwise provided herein". Banking Law, Section 263.

Numerous individual savings banks in New York sell and service life insurance policies to persons and groups, retaining and investing the proceeds. Underwriting, actuarial services, the setting of premiums and standards of acceptability, preparation of forms, approval of claims, and other technical functions are performed for the banks centrally by the Savings Bank Life Insurance Fund (hereinafter "the Fund"). The Fund also maintains and invests

<sup>1</sup> The record citations for each of the facts stated may be found in Plaintiffs' Statement of Material Facts, which the District Court accepted as true. App. 2a, n. 1.

a guaranty fund to cover any unusual volume of claims, which fund has been accumulated through contributions from the savings banks of 1/20 of 1% of their premium income. No resource to the guaranty fund has ever been necessary and it now totals approximately \$4.4 million. Non-investment expenses of the Fund are defrayed by assessments of the banks.

Neither New York nor its taxpayers subsidize the Fund or the SBLI system. In fact, Banking Law Section 270 expressly prohibits the use of "public moneys, money of the state, or under state control, or subject to audit by the state comptroller" for the SBLI system, and the banks which sell SBLI must even pay the full cost of examinations by the Banking and the Insurance Departments of New York. App. 6a and 21a, n. 9. Banks which sell SBLI are subject to the same taxes on their life insurance operations as any other life insurance issuer. Regulatory requirements imposed on issuers of SBLI are essentially identical to those imposed on issuers of other life insurance in New York.

There is no difference between SBLI and other life insurance sold in New York with respect to reliability, quality, or service to the public. SBLI, however, is less expensive than its competitors in New York, App. 21a, n. 7.<sup>2</sup> Its lower cost appears to be primarily due to two factors: it is sold exclusively by salaried bank personnel over the counter, by mail, and by telephone, rather than by agents working on commissions and selling door-to-door, and it has a relatively low termination rate. SBLI enjoys a high level of consumer

<sup>2</sup> The magnitude of SBLI's price advantage can be quite substantial. See Plaintiffs' Statement of Material Facts, §§ 18-19.

satisfaction and many additional non-residents would purchase it were it not for the prohibition in Section 268.

On December 5, 1973, appellant Edward J. Gorin, a resident of New Jersey employed in New Jersey, applied to the Savings Bank of Rockland County for \$30,000 of SBLI. His application was refused on the sole ground that, as a non-resident who worked in New Jersey, he was prohibited by Section 268 from purchasing any SBLI.

#### B. Proceedings in the Three-Judge District Court

On January 14, 1974, appellant Gorin, appellant Consumers Union,<sup>3</sup> and Ira Furman commenced this action against the Superintendent of Banks of New York, Harry W. Albright, Jr. (since succeeded by John G. Heimann), who was responsible for the enforcement of the challenged statute. The amended complaint alleged that Section 268 (the geographical restriction) and Section 266 (a provision limiting purchasers of SBLI to \$30,000 of insurance) violated various provisions of the United States and New York constitutions. The amended complaint sought declaratory and injunctive relief and the convening of a three-judge court. On September 20, 1974, U.S. District Judge Lee P. Gagliardi denied defendant's motion to dismiss and a three-judge court was duly convened. After taking some discovery, plaintiffs moved for summary judgment on January 20, 1976. On April 21, 1976, defendant filed his answer (more than eighteen months late) and opposed plaintiffs' motion but did not either then or later himself cross-move for summary judgment. The New York State

<sup>3</sup> Many of Consumers Union's members are non-residents who wish to purchase SBLI but are rendered ineligible by reason of Section 268. The district court found it unnecessary to reach the question of Consumers Union's standing to sue. App. 3a, n. 2.

Association of Life Underwriters, an organization of insurance agents, filed a brief *amicus curiae* in support of defendant. On July 13, 1976, the three-judge court heard oral argument in the case.

### C. The Decision of the Three-Judge Court

On February 24, 1977, the district court issued its opinion, granting summary judgment to defendant on both causes of action.

The court first addressed the constitutionality of Section 268, the geographical restriction. It noted that Section 268 created a classification discriminating against non-residents regarding "their access to inexpensive life insurance" (App. 4a) and that New York "was not acting to protect the state fisc as is often the reason for passing such regulations". App. 6a. Wholly ignoring the stipulation in the record that "defendant has no knowledge concerning the legislative purpose(s), if any, served by the geographical restriction imposed by Section 268",<sup>4</sup> the court managed to imagine—without benefit of any legislative history or other support—several "conceivable" state interests justifying Section 268. These "conceivable" interests were to provide a benefit and security to its taxpayers or those with an economic nexus (residence or work) to the state", "[a]ttracting people to the state to live or work", preserving savings banks as "local institutions", and "to protect the life insurance industry and to protect savings banks from allowing insurance activities to prosper at the expense of traditional banking functions". App. 6a-7a. Applying the "rational relation" test for compliance with the Equal Protection clause, the court upheld Section 268.

<sup>4</sup> Letter of Stipulation dated March 18, 1975, filed with the court.

The court then considered plaintiffs' contention that the Privileges and Immunities clause of Article IV, Section 2 invalidated Section 268. Again citing the aforementioned "conceivable" state interests of which even defendant had admitted complete ignorance, the court applied a novel interpretation of the clause, distinguishing discriminatory imposition of *burdens* on non-residents from discriminatory denial of *benefits* to non-residents, prohibiting the former but not the latter. Since Section 268 involves a benefit rather than a burden, the court held that the clause was not violated. App. 10a.

Turning to plaintiffs' Commerce clause argument, the court acknowledged that Section 268 "does have some impact on interstate commerce" (App. 12a) but concluded without any analysis that this burden was "minimal compared to the local benefits of the regulation" App. 13a. Finally, the court, on the basis of the statutory purpose which it itself had conceived, dismissed the numerous New York decisions striking down on state due process grounds statutes (like Section 268) designed to protect an industry against competition rather than to protect the interests of the public. App. 15a.<sup>5</sup>

<sup>5</sup> In addition, the court rejected plaintiffs' challenges to Section 266, the \$30,000 policy limitation. App. 4a-5a. Since appellants are not appealing the decision with respect to Section 266, no further discussion is necessary.

THE QUESTION PRESENTED IS SUBSTANTIAL AND REQUIRES PLENARY CONSIDERATION BY THIS COURT

The instant case involves a novel variation on an ancient theme: state law barriers to free trade among the citizens of the several states. In this unprecedented case, (1) persons in State A (New Jersey) are barred by State B (New York) from purchasing a product (life insurance) from one supplier in State B (banks) which product is fully available to any and all residents of State B; (2) the State A persons are nevertheless permitted by State B to purchase an essentially identical—but more expensive—product (life insurance) from other suppliers in State B (insurance companies); and (3) State B stipulates that it has no knowledge of any legislative purpose advanced by the prohibition.<sup>6</sup> In short, it is as if New York permitted New Jerseyans to come across the Hudson River to shop for clothing at Saks Fifth Avenue but forbade them to purchase the clothing at Macy's.

If cases involving such bold discrimination by one state against the citizens of another who seek access to part of its market are unusual, it is because this Court, in its decisions under the Commerce clause and under the Privileges and Immunities clause of Article IV, has "consistently . . . rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state", except to serve genuine health and safety needs. *H. P.*

<sup>6</sup> *Supra*, n. 4.

*Hood & Sons v. Dumond*, 336 U.S. 525, 535 (1949) (emphasis supplied).<sup>7</sup>

A. The Commerce Clause

The district court acknowledged that Section 268 imposes "some burden on interstate commerce" in SBLI (App. 12a). In fact, it does more than simply burden interstate commerce; it *directly and intentionally forecloses most interstate commerce in SBLI altogether*. Thus, Section 268 is far more restrictive of interstate commerce than the merely burdensome barriers struck down in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Flood v. Kuhn*, 407 U.S. 258, 284-85 (1972), affirming 443 F.2d. 264 at 267-68 (2nd Cir. 1971), *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) and a host of other cases. Like the barrier struck down just last Term in *The Great Atlantic and Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976), Section 268 has a "devastating effect upon the free flow" of interstate commerce. *Id.* at 374.

In *Cottrell*, the restriction at least purported to be a local health measure, traditionally treated with deference by this Court. Even such a purpose, however, failed to pass muster under the Commerce clause, for "only state interests of substantial importance" could justify such a burden on interstate commerce. 424 U.S. at 375. In this case, appellee has stipulated that Section 268 did not even purport to

<sup>7</sup> The McCarran-Ferguson Act, 15 U.S.C. § 1011-15 is not applicable to a statute such as Section 268 which is not designed to protect the state's own citizens but rather constitutes extra-territorial regulation by New York. See, *FTC v. Travelers Health Association*, 362 U.S. 293, 301 (1960). The district court assumed *arguendo* that it was applicable. App. 11a-12a.

advance any public purpose of New York. If *Cottrell* means anything, it means that a district court may not (as the court below did) supply a justification for a direct prohibition of interstate commerce simply by imagining merely "conceivable" interests and then favoring those "conceivable" interests over the direct prohibition of commerce. As this Court has noted, the Commerce clause ensures that "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." *H.P. Hood & Sons v. Dumond*, *supra* at 539. The district court directly challenges that long-standing doctrine.

#### B. Privileges and Immunities Clause of Article IV

The district court rejected appellants' reliance on the Privileges and Immunities clause of Article IV for two reasons. First, it ignored appellee's stipulation that he knows of no legislation purpose which supports Section 268; instead the District Court imputes to New York *hypothetical* legislative purposes upon which the New York legislature never relied in enacting Section 268.

Second, the District Court took an extremely limited view of the applicability of the Privileges and Immunities clause, contrary to this Court's decision in *Toomer v. Witsell*, 334 U.S. 385 (1948) and unduly narrowing this Court's rule in *Austin v. New Hampshire*, 420 U.S. 656 (1975). The District Court held (App. 10a):

The affirmative burden of a tax as a condition of working in-state is very different from the denial of a benefit to out-of-state citizens under Section 268, Plaintiff's Art. IV challenge must fail because of Section 268's . . . failure,

in privileges and immunities terms, to place a burden or penalty on out-of-state citizens for the benefit of in-state citizens.

The District Court offered no authority for this distinction. The effect of its holding would prevent New York from permitting Gorin to purchase an SBLI policy subject to a burdensome tax not imposed on New Yorkers, but permit New York to prohibit altogether Gorin's purchase of SBLI.

Neither *Toomer* nor *Austin* offers any rationale to support a constitutional distinction between a burden on income-producing activities and a burden on or denial of other privileges afforded to in-staters. Certainly, neither of these cases suggests that the latter category of discrimination falls without the Privileges and Immunities clause. Nor does either suggest that the clause can be violated only by a discrimination which accrues to the direct "benefit of in-state citizens", as suggested by the District Court's opinion.<sup>8</sup>

In *Toomer*, the differences in rates charged to in-staters and to out-of-staters for a license required to shrimp in state waters was so great as to be "virtually exclusionary" of out-of-staters. 334 U.S. at 396-397. Section 268, which is explicitly and totally exclusionary, is *a fortiori* violative of Privileges and Immunities clause as construed in *Toomer*.

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<sup>8</sup> *Toomer*, in which discrimination accrued directly to the benefit of in-state shrimpers, did not rely on this fact as a basis for decision and, in any event, Section 268 similarly accrues to the benefit of in-state life insurers other than savings banks. In *Austin*, the only direct benefit to in-staters was increased revenue to the state treasury, a factor neither discussed or analyzed by the Court, which merely mentioned the amounts involved in a footnote to the opinion. 420 U.S. at 659, n. 3.

Thus, the District Court's decision is contradicted by the precedents of this Court. It is based on a distinction of the District Court's own creation. And it would, without precedential authority, seemingly limit application of the Privileges and Immunities clause to situations where the burden or exclusion is by means of a tax, rather than by means of an express exclusion.

### CONCLUSION

For the reasons stated, the Court should note probable jurisdiction and give plenary consideration to this case.

Respectfully submitted,

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### APPENDIX A

FEB 28 1977

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CONSUMERS UNION OF UNITED STATES, INC.,  
EDWARD J. GORIN and IRA J. FURMAN,

74 Civ. 234

*Plaintiffs,*

OPINION

-against-

HARRY W. ALBRIGHT, JR., Superintendent  
of Banks of the State of New York

*Defendant.*

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Before HAYS, Circuit Judge, and GAGLIARDI and KNAPP,  
District Judges

GAGLIARDI, District Judge

Plaintiffs move pursuant to Rule 56 Fed. R. Civ. P. for summary judgment seeking to permanently enjoin the enforcement, operation and execution of Sections 266 and 268 of the Banking Law of the State of New York. N.Y. Bank. Law §§ 266 & 268 (McKinney 1971). Plaintiffs allege that these provisions which relate to savings bank life insurance are violative of various provisions of the Constitution of the United States and of the Constitution of the State of New York. Jurisdiction is based on 28 U.S.C. §§ 1331 (a) and 1343(3).

This action was commenced on January 14, 1974; a three-judge court was ordered convened pursuant to a memorandum decision and order of September 20, 1974. The three-judge court was duly convened and an oral argument was held on July 13, 1976. For the reasons stated herein, this court, pursuant to the discretionary power granted in Rule 54(c) Fed. R. Civ. P., grants summary judgment in favor of the defendant.<sup>1</sup>

Plaintiffs are Consumers Union of United States, Inc., a New York non-profit membership corporation, Edward J. Gorin, an individual who resides and regularly works in New Jersey, and Ira J. Furman, an individual who resides

in New Jersey but regularly works in New York.<sup>2</sup> Defendant is the Superintendent of Banks of the State of New York.<sup>3</sup>

Article VI-A of the Banking Law of New York entitles any savings bank subject to New York law to sell life insurance ("savings bank life insurance" or "SBLI") by establishing a life insurance department. N.Y. Bank. Law § 261 *et seq.* (McKinney 1971). In this case plaintiff Gorin attempted to buy \$30,000 of savings bank life insurance and was refused on the ground that such a purchase would violate Section 268 of New York's Banking Law which prohibits the sale of an SBLI policy to any person who neither resides nor regularly works in New York State.<sup>4</sup> Plaintiff Forman [sic] attempted and was denied the opportunity to purchase a \$40,000 savings bank life insurance policy. Such a purchase would be in violation of Section 266 of New York's Banking Law which prohibits the sale of an SBLI policy in an amount in excess of \$30,000 or in an amount which, together with other SBLI policies already in force on the life of the applicant, would exceed \$30,000.<sup>5</sup>

Plaintiffs contend that these two sections violate the equal protection clauses of the Federal and New York State Constitutions. U.S. Const. amend. XIV, § 1 and N.Y. Const. art. I, § 11. They also contend that the two sections violate the due process clause of the New York State Constitution, art. I, § 6; the commerce clause of the Federal Constitution, art. I, § 8, cl. 3; and 42 U.S.C. § 1983. Additionally, plaintiffs argue that Section 268 violates the privileges and immunities clauses of the Federal Constitution. Art. IV, §2, cl. 1 and Amend. XIV, §1.

## SECTION 268: Geographical Limitation

## Equal Protection

Plaintiffs allege that Section 268 violates the equal protection clauses of the federal and state Constitutions, U.S. Const. amend. XIV § 1 and N.Y. Const. art. I, § 11, in discriminating between residents of New York and non-residents by prohibiting almost all of the latter from purchasing SBLI<sup>6</sup>, while permitting all residents to purchase SBLI. For the purposes of this action there is no difference in intent, meaning or interpretation between the equal protection clauses in the state and federal Constitutions. See *Gleason v. Gleason*, 26 N.Y.2d 28, 41, 256 N.E.2d 513, 520, 308 N.Y.S.2d 347, 356 (1970); *Bauch v. City of New York*, 21 N.Y.2d 599, 607, 237 N.E.2d 211, 214, 289 N.Y.S.2d 951, 955, cert. denied, 393 U.S. 834 (1968). As a result, the analysis under the federal equal protection clause is applicable and dispositive of the state equal protection claim.

Under an equal protection analysis, Section 268 creates a discriminatory classification. Section 268 distinguishes between residents or those regularly employed in New York and nonresidents. With respect to their access to inexpensive life insurance, these two classes are not equal and the classification must be considered to be discriminatory.<sup>7</sup>

The next requirement in an equal protection challenge is to determine what standard the court should apply in reviewing the discriminatory classification. The Supreme Court has consistently recognized that a state has broad discretion in enacting social and economic legislation, like the Banking Law in the case at bar, and has applied the "reasonable relation" test to the review of such legislation.

See *City of New Orleans v. Dukes*, 96 S. Ct. 2513 (1976); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). As the Supreme Court set forth in *Dandridge v. Williams*, *supra* at 485:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [1911]. "The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70. [1913].

A stricter standard of review can only be applied when there is an identifiable "suspect classification" *see, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage) or "fundamental interest" at issue. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel). No such classification or interest<sup>8</sup> is at issue in this case.

Under the "rational relation" test, there is a presumption of constitutional validity attached to the legislative clas-

sification, and the plaintiffs have the burden of demonstrating that Section 268 does not bear a reasonable or rational relation to a legitimate governmental interest of the State of New York. See *City of New Orleans v. Dukes*, *supra* at 2517; *Hughes v. Alexandria Scrap Corp.*, 96 S. Ct. 2488, 2499 (1976); *Madden v. Kentucky*, 309 U.S. 83 (1940). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, *supra* at 426.

This court recognizes that New York State, pursuant to its police powers can choose to allow savings banks to sell life insurance or not within the limits of the equal protection clause of the Constitution. In choosing to restrict the sale of SBLI to state residents and individuals who work in New York, the legislature was not acting to protect the state fisc as is often the reason for passing such regulations. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484, 495-96 (1974) (upholding California's disability insurance program's exclusion of normal pregnancies to avoid state subsidy and for other reasons); *Dandridge v. Williams*, *supra* (upholding Maryland's administration of an aspect of its public welfare program). In fact, the New York law expressly prohibits the use of "public money" for the SBLI system.<sup>9</sup>

However, the state does have legitimate economic and social interests in limiting sales of SBLI policies to persons living or working in the state. The first and most important state interest is to provide a benefit and security to its taxpayers or those with an economic nexus (residence or work) to the state. Attracting people to the state to live or work is a legitimate state interest which justifies limiting SBLI under Section 268. This geographic limit is also consistent with the state controlled role of savings

banks as local institutions. For example, the state specifically regulates savings banks' investments in mortgages on owner occupied one- and two-family residences located outside of New York or outside a 50 mile radius from the bank's principal office. N.Y. Bank. Law § 235 (6) (McKinney 1971). Additionally, the restrictions on SBLI to protect the life insurance industry and to protect savings banks from allowing insurance activities to prosper at the expense of traditional banking functions is a legitimate exercise of the state's power. As a result, this court cannot say that one or more of these goals is not a legitimate governmental interest rationally promoted by the Section 268 requirement here in issue. See *Wright v. City of Jackson, Mississippi* 506 F.2d 900, 903-4 (5th Cir. 1795); see also *McGowan v. Maryland*, *supra* at 425-26. Therefore, Section 268 may reasonably be conceived to have a rational basis and does not violate the equal protection clause of the state or federal Constitutions.

#### Privileges and Immunities

Plaintiffs contend that Section 268 violates the privileges and immunities clauses of the Fourteenth Amendment § 1 and Art. IV, § 2 of the United States Constitution. Section 1 of the Fourteenth Amendment provides, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .

The clause protects from state infringement rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship. *Madden v. Kentucky*, 309 U.S. 83, 90-91 (1940); see *Snowden v. Hughes*, 321 U.S. 1, 6-7 (1944). Those rights of national citizenship

arise "out of the nature and essential character of the national government, and [are] granted or secured by the Constitution of the United States." *Madden v. Kentucky*, *supra* at 92 n.21, quoting *In re Kemmler*, 136 U.S. 436, 448 (1890). The ability to purchase SBLI is in no way such a right of national citizenship. See *Hawkins v. Moss*, 503 F.2d 1171, 1178-79 (4th Cr. 1974), *cert. denied*, 420 U.S. 928 (1975). The right to travel, recognized to be a right of national citizenship, *Edwards v. California*, 314 U.S. 160, 181 (1941), does not entitle plaintiffs to equality of access to the market in state authorized and regulated SBLI.

Turning to the second privileges and immunities challenge, Art. IV, § 2, cl. 1 of the Constitution provides:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.

Generally, this clause was intended "to help fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). The Supreme Court has established that "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that state." *Toomer v. Witsell*, *supra* at 396, cited in *Austin v. New Hampshire*, 420 U.S. 656, 663 n. 9 (1975).

Nonetheless, residents and nonresidents can be treated differently without violating the privileges and immunities clause where there are valid reasons for doing so. *American Commuters Assoc., Inc. v. Levitt*, 279 F. Supp. 40, 47-48 (S.D.N.Y. 1967), *aff'd*, 405 F.2d 1148, 1152-53 (2d Cir. 1969). The Supreme Court in *Toomer v. Witsell*, *supra* at

396, set forth the criteria for evaluating the constitutionality of a statute challenged under the privileges and immunities clause of Art. IV of the Constitution:

Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils, and in prescribing appropriate cures. (footnote omitted)

As already outlined in the equal protection discussion, *supra*, New York State can demonstrate valid independent reasons for limiting SBLI under Section 268 and denying the privilege to certain nonresidents of the state. Because it is consistent with the State's substantial interest in regulating savings banks as local institutions and not nationwide insurance markets, the legislature's passage of Section 268 is not in violation of the privileges and immunities clause. See, *American Commuters Assoc., Inc. v. Levitt*, *supra*.

The case at bar can be distinguished from *Toomer v. Witsell*, *supra*, where the Supreme Court overruled a South

Carolina statute requiring nonresidents to pay one hundred times greater licensing fees for the privilege of shrimping in South Carolina waters than the fees required of residents. The Court could not find that the South Carolina statute met the state purpose to conserve shrimp. *Id.* at 397. And, in any event, the Court did not find "that non-citizens constitute a peculiar source of the evil at which the statute is aimed" *Id.* at 398. In contrast, the substantial state interest in Section 268 is based upon the harmful effects of nationwide SBLI sales and the threat to traditional banking functions that sales to persons without a nexus to the state (work or residence) would create.

Similarly, the present case is distinguishable from *Austin v. New Hampshire*, *supra*, where the Supreme Court overruled a New Hampshire tax on Maine citizens working in New Hampshire that its own citizens did not have to pay. The Court found that the statute conflicted with the underlying privileges and immunities clause policy of comity by imposing a unilateral disadvantage upon nonresidents. *Id.* at 665-67. The affirmative burden of a tax as a condition for working in-state is very different from the denial of a benefit to out-of-state citizens under Section 268.<sup>10</sup> The excessive license fee in *Toomer v. Witsell*, *supra*, presents a similar unconstitutional affirmative burden not present in Section 268. Plaintiff's Art. IV challenge must fail because of Section 268's reasonable relation to a proper governmental purpose and because of its failure, in privilege and immunities terms, to place a burden or penalty on out-of-state citizens for the benefit of in-state citizens.

### Interstate Commerce

Plaintiffs attack Section 268 under the commerce clause, Art. I, § 8, cl. 3 of the United States Constitution, which provides that, "Congress shall have power . . . To regulate

Commerce . . . among the several States . . ." By this clause the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the States. *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923). The issue in this case is whether Section 268 constitutes a forbidden state interference with interstate commerce in violation of the Constitution.

In that regard, the first question is whether insurance and specifically SBLI is a lawful article of "commerce" within the meaning of the interstate commerce clause. Congress, in 1945, passed the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, which on its face holds that the business of insurance shall be subject to the laws of the several states and shall not be subject to federal regulation. The Act's constitutionality was upheld by the Supreme Court in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946); see *Guardian Life Insurance Co. v. Chapman*, 302 N.Y. 226, 240, 91 N.E.2d 877, 884-85 (1951). While the Act did not give the states power to regulate all aspects of insurance activity, provisions like Section 268 of the New York Banking Law regulating the business of insurance and focused on the policyholder-bank relationship may be within the purview of the Act and not subject to interstate commerce regulation. See *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 459-60 (1969).

However, under the facts of this case, the court does not find it necessary to establish the applicability of the McCarran-Ferguson Act. For even if insurance is an article of commerce, there is no indication that Section 268 violates the interstate commerce clause. Under interstate commerce clause analysis, the next question is whether Section 268 affects and burdens interstate commerce

so as to be subject to the clause. Section 268, unlike most statutes challenged under the clause, does not affirmatively regulate articles actually in interstate commerce. See, e.g., *H. P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949); *Toomer v. Witsell*, *supra*; *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). Nonetheless, Section 268 by prohibiting the sale of SBLI to persons who do not work or live in New York does have some impact on interstate commerce.

Having established some burden on interstate commerce, the court must look to "the criteria for determining the validity of state statutes affecting interstate commerce" as established by the Supreme Court and set forth in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970):

Where the statute regulates evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 [1960]. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

See *Great Atlantic and Pacific Tea Co., Inc. v. Cottrell*, 96 S. Ct. 923, 928 (1976).

This court has already examined the "legitimate local public interest" of Section 268. On its face Section 268

"concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines." *Great Atlantic and Pacific Tea Co., Inc. v. Cottrell*, *supra* at 928 n. 6, quoting *DiSanto v. Pennsylvania*, 273 U.S. 34, 44 (1927) (Stone, J., dissenting); see *Southern Pacific Co. v. Arizona*, *supra* at 770. Section 268 is not an attempt by the state to advance its own commercial interest. See *H.P. Hood & Sons v. DuMond*, *supra* at 535; *Pike v. Bruce Church, Inc.*, *supra* at 143; *Toomer v. Witsell*, *supra* at 397. Rather it is a legitimate attempt by the state to insure that savings banks are maintained as local institutions serving neighborhood clientele. The balancing test of *Pike v. Bruce Church, Inc.* *supra*, conclusively establishes that Section 268 does not violate the interstate commerce clause because the burden it imposes on interstate commerce is minimal compared to the local benefits of the regulation which could not be promoted in any other manner.

### Due Process

Plaintiffs allege that Section 268 denies them due process of law in violation of Art. I, § 6 of the New York Constitution which provides:

No person shall be deprived of life, liberty or property without due process of law.

The applicable rules for analysis of substantive due process under the New York State Constitution have been set forth by the New York State Court of Appeals in *Defiance Milk Products Co. v. DuMond*, 309 N.Y. 537, 540-41, 132 NE.2d 829, 830 (1956):

The applicable rules of law are well known. Every legislative enactment carries a strong presumption of constitutionality including a rebuttable presumption of the existence of necessary factual support for its provisions. *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209, 210, 55 S. Ct. 187, 79 L. Ed. 281 [1934]. If any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends. *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S. Ct. 778, 82 L. Ed. 1234 [1937]. Questions as to wisdom, need or appropriateness are for the Legislature. Courts strike down statutes only as a last resort, and only when unconstitutionality is shown beyond a reasonable doubt. But, for all that, due process demands that a law be not unreasonable or arbitrary and that it be reasonably related and applied to some actual and manifest evil. And even though a police power enactment may have been or may have seemed to be valid when made, later events or later-discovered facts may show it to be arbitrary and confiscatory. (citations omitted).

In *Defiance Milk* the New York State Court of Appeals affirmed the lower court's striking down a prohibition on the sale of evaporated skimmed milk except in packages of ten pounds or more. The court found, "*no rational ground* for so arbitrary and unnecessary a prevention of the sale of a wholesome food product," *Id.* at 541, 132 N.E.2d at 830 (emphasis added), and found the prohibition was "not a reasonable way of dealing." *Id.* at 541, 132 N.E.2d at 831.

In essence the substantive due process test for the validity of police power legislation is whether the legislation bears a reasonable or rational relation to a proper governmental interest. See, e.g., *Trio Distributor Corp. v. City of Albany*, 2 N.Y.2d 690, 143 N.E. 2d 329, 163 N.Y.S. 2d 585 (1957). In the case at bar, "deference to . . . legislative judgment is particularly pronounced in a field as traditionally well regulated as insurance." *Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220, 224 n. 4 (1949). Section 268, as already set forth in the equal protection analysis, *supra*, does bear a rational relation to a proper governmental purpose. Limiting sales of SBLI to persons with a residential or occupational connection to New York provides a benefit and security to those persons actively related to the state and encourages savings banks to maintain their character as local institutions. Given the strong presumption favoring constitutionality, Section 268 cannot be said to violate the due process clause of the New York State Constitution.

#### 42 U.S.C. § 1983

Plaintiffs also allege a cause of action under 42 U.S.C. § 1983 which allows suit for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." Plaintiffs § 1983 claim does not raise any issues not already analyzed and rejected under their equal protection and privileges and immunities claims, *supra*.

#### SECTION 266: Policy Limitation

##### Equal Protection

Plaintiffs allege that Section 266 discriminates against classes of persons in violation of federal and state equal

protection. U.S. Const, amend. XIV, § 1 and N.Y. Const. art. I, § 11. As in Section 268, *supra*, there is no difference in analysis between federal and state equal protection and the analysis under federal equal protection is dispositive of the state equal protection claim. Under an equal protection analysis, the Section 266 \$30,000 policy limitation does not present a discriminatory classification. Anyone within the limits of Section 268 can purchase up to \$30,000 of SBLI under Section 266 and no one can purchase any more savings bank life insurance. This is not a case that imposes a minimum financial threshold for participation. Compare *Douglas v. California*, 372 U.S. 353 (1963). The inability of some to purchase additional non-SBLI is not imposed by Section 266. Even if all other insurance were more expensive than SBLI,<sup>11</sup> the state is not prevented from providing that same benefit to everyone (within Section 268 limits). Section 266 does not force anyone to buy SBLI and does not create any discriminatory classification.

Even assuming Section 266 does create some kind of discriminatory classification, the regulation cannot be set aside because, under the "rational basis test" applied to Section 268 and applicable to Section 266 for the same reasons, the statute bears a rational relationship to a legitimate governmental interest. See *City of New Orleans v. Dukes*, *supra*. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, *supra* at 426.

The state has a legitimate interest in protecting and controlling savings banks from allowing insurance activities to prosper at the expense of traditional banking functions. By putting a limit on the dollar amount of an

individual's policy, the state furthers its legitimate interest in encouraging savings banks to cater to their regular customers instead of focusing their energies on selling expensive insurance policies. Section 266, like Section 268, is in keeping with the state regulation of savings banks as local institutions to serve the needs of moderate income customers.<sup>12</sup> Savings bank life insurance historically has been directed to the needs of persons of small means and the evils of industrial life insurance.<sup>13</sup> "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, *supra* at 486-87, citing *Lindsley v. Natural Carbonic Gas Co.*, *supra*. This court cannot say that the goals of the legislature in passing Section 266 are not legitimate governmental interests rationally promoted by the Section 266 policy limitations here in issue. See *McGowan v. Maryland*, *supra* at 425-26; *Wright v. City of Jackson, Mississippi*, *supra* at 903-04.

### Interstate Commerce

For the reasons already examined under the interstate commerce analysis of Section 268, Section 266 must be upheld as not violative of Art. I, § 8, cl. 3 of the United States Constitution. Again the court need not decide if Section 266 is a permissible state regulation of the sale of insurance within the meaning of the McCarran-Ferguson Act. Even if Section 266 is subject to the interstate commerce clause, the regulation is constitutional. Section 266's burden on interstate commerce is minimal and concededly less than the burden of Section 268. The \$30,000 policy limit only affects interstate commerce among those persons working in New York who do not live there

and who wish to purchase more than \$30,000 in savings bank life insurance. This incidental effect on interstate commerce of Section 266 must be balanced against the local benefits of the section. *Pike v. Bruce Church, Inc.*, *supra* at 142. The already established legitimate local purpose of Section 266 (see equal protection analysis, *supra*) clearly outweighs the minimal impact of the regulation on interstate commerce.

### Due Process

Plaintiffs attack Section 266 as violative of substantive due process under the New York State Constitution, Art. I, § 6. As already set forth in the due process analysis under Section 268, *supra*, the applicable rule under a due process challenge is whether the legislation bears a reasonable or rational relation to a legitimate governmental interest. *De-fiance Milk Products v. DuMond*, *supra*; *Trio Distributor Corp. v. City of Albany*, *supra*. As already set forth, the \$30,000 policy limitation of Section 266 bears such a rational relationship to a legitimate state interest. SBLI was intended for the small wage earner and a policy limit insures that savings banks will continue to serve these customers and not redirect their energies to large scale life insurance purchasers. The legislature's providing this limitation is in keeping with legislatively imposed ceilings and restriction on other activities of savings banks.<sup>14</sup> The \$30,000 policy limit has been gradually increased by the legislature to its present level from a \$3,000 limit when the regulation was enacted in 1939. L. 1939, c. 882 adding Art. IX-D to the Insurance Law. Section 266 reflects a careful legislative analysis of the need for SBLI balanced against the other requirements of savings banks. Section 266 is rationally related to legitimate state interests and does not violate due process under the New York State Constitution.

### 42 U.S.C. § 1983

Plaintiffs also allege that Section 266 violates rights protected under 42 U.S.C. § 1983. Their § 1983 claim does not raise any issues not already analyzed and rejected.

### CONCLUSION

Therefore, this court finds that Section 268 and 266 of the New York Banking Law are constitutional and grants summary judgment in favor of the defendant.

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U.S.C.J.

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U.S.D.J.

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U.S.D.J.

\*While all of the judges concurred in the result, one of the judges due to illness did not participate in the written opinion.

## FOOTNOTES

<sup>1</sup> See 6 J. Moore's, Federal Practice ¶56.12 (1976). Defendant has filed Affidavits and a Statement in Opposition to plaintiffs' 9(g) statement. Rule 9(g), General Rules for the Southern and Eastern Districts. The court grants summary judgment for the defendant even accepting plaintiffs' 9(g) Statement and the allegations made therein to be true.

<sup>2</sup> Inasmuch as the standing of plaintiffs Gorin and Furman is unquestioned, in view of the decision in this case, the court does not reach the question of plaintiff Consumers Union's standing to sue.

<sup>3</sup> Currently John G. Heimann is Superintendent of Banks, having assumed that position on August 1, 1975 replacing Harry W. Albright, Jr.

<sup>4</sup> § 268. Geographical limitation.

No application for insurance shall be accepted except from a resident of this state or a person working regularly therein.

<sup>5</sup> § 266. Limit of insurance.

A savings and insurance bank may obligate itself to pay not more than thirty thousand dollars in the event of the death of one person exclusive of:

(A) Dividends, profits or paid-up insurance, purchased with such dividends or profits; and

(B) Such amounts as may be payable under (a) a group policy, (b) a policy issued pursuant to conversion privileges of such a group policy, (c) an annuity contract embodying an agreement to refund, upon the death of the holder, to his estate or to a specified payee, a sum not exceeding the premiums paid thereon with compound interest, (d) an agreement to pay benefits of not more than three times the face amount of the policy in the event of death by accident or accidental means, (e) such agreement as it may make to pay an amount equal to a cash surrender value in excess of the face amount of the policy, or (f) an agreement to waive certain future premiums under a policy issued on the life of a minor or on the life of the spouse of the payor upon the death of the payor of such premiums.

Except as provided in subdivisions (A) and (B) of this section no savings and insurance bank shall issue any policy or policies of life insurance to any applicant, if the insurance so issued together with other savings bank life insurance policies in force on the life of such applicant would exceed the maximum amount that is permitted by this section to be issued by one savings and insurance bank.

No savings and insurance banks shall write any annuity contract otherwise binding it to pay in any one year more than three thousand dollars exclusive of dividends or profits.

<sup>6</sup> Section 268 allows persons who regularly work in New York but do not live in the state to purchase an SBLI policy. The regulation also allows a person who lives or regularly works in New York to apply for an SBLI policy on the life of a member of his immediate family even if that person does not live or work in New York.

<sup>7</sup> The parties agree that there is generally no difference between SBLI and non-SBLI with respect to reliability, quality or service to the public. Plaintiffs' 9(g) Statement ¶21. Plaintiffs, however, claim that SBLI is "usually" less expensive than comparable non-SBLI insurance. Plaintiffs' 9(g) Statement ¶8 & 9. While defendant contests this finding, for the purposes of this motion the court assumes that SBLI is less expensive than comparable forms of non-savings bank life insurance.

<sup>8</sup> Section 268 does not present a durational residency requirement since the regulation requires only that the applicant be a resident of New York or work in New York at the time of the purchase of SBLI. *Accord August v. Bronstein*, 369 F. Supp. 190, 194 (S.D.N.Y.) (three judge court), *aff'd*, 417 U.S. 901 (1974). As a result, the regulation does not infringe the right to interstate travel and cases presenting durational residence requirements, e.g., *Dunn v. Blumstein*, *supra* (one year state residency for voting); *Shapiro v. Thompson*, *supra* (one year state residency for welfare benefits) have no applicability to this case.

<sup>9</sup> Under N.Y. Bank Law § 270 (McKinney 1971) the SBLI banks must even pay the full cost of examinations by the Banking and Insurance Departments of New York.

<sup>10</sup> Throughout the opinion in *Austin v. New Hampshire*, *supra*, the Court refers to the "burden" or "imposition" posed by the New Hampshire tax on Maine residents. *Id.* at 661, 662, 665, 667 n. 12. Unlike the Maine residents who were taxed for working in New Hampshire, nonresidents who work in New York are entitled to the benefit of SBLI. Only those nonresidents with no economic nexus to the state are affected by Section 268, and they are not burdened by the regulation but are rather deprived of the benefit of SBLI.

<sup>11</sup> See n. 7, *supra*.

<sup>12</sup> The court notes the Banking Department's response to savings bank requests for its support of a no-ceiling billing in 1943 in a memorandum prepared by the then Deputy Superintendent (Banking Department Ans. 5(f), Ex. 7, p. 5):

(c) If the limit on savings bank life insurance is raised to too high a figure, it will encourage the banks to stress sales to the larger policyholder and will tend to cause them to neglect the small policyholder for whom the benefit of the statute was originally intended.

<sup>13</sup> In 1938 the New York State Legislature empowered savings banks to sell life insurance. L. 1938, c. 471, adding Art. 10-A to the Insurance Law. The New York legislation paralleled the Massachusetts SBLI system and was enacted to correct the evils of industrial life insurance sold by commercial carriers to generally low-income wage earners. See Brandeis, Savings Bank Life Insurance for Wage Earners, 1907 Albany Law Journal 50. The savings banks with experience administering "the savings of persons of small means" were best qualified to provide a fiscally sound, economic alternative to insure these persons of small means. See Brandeis, *supra* at 50-53.

<sup>14</sup> See Section 268 Equal Protection analysis, *supra*.

## APPENDIX B

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CONSUMERS UNION OF UNITED STATES, INC.,  
et al.,

*Plaintiffs,*

Civil Action No.  
74 Civ. 234 LPG

v.

HARRY W. ALBRIGHT, JR.,

*Defendant.*

## NOTICE OF APPEAL

Plaintiffs Consumers Union of United States, Inc. and Edward J. Gorin hereby give notice that they are appealing to the Supreme Court of the United States from that portion of the final judgment entered against them by this court on February 25, 1977 which sustains the constitutionality of Section 268 of the Banking Law of the State of New York. Said appeal is taken under 28 U.S.C. § 1253.

Respectfully submitted,

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DATED: March 18, 1977

**Supreme Court of the United States**

OCTOBER TERM, 1976

No. 76-1606

CONSUMERS UNION OF UNITED STATES, INC. and  
EDWARD J. GORIN,

*Appellants,*

*v.*

JOHN G. HEIMANN, Superintendent of Banks  
of the State of New York,

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION TO DISMISS OR AFFIRM**

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**Supreme Court of the United States**

OCTOBER TERM, 1976

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No. 76-1606

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CONSUMERS UNION OF UNITED STATES, INC. and  
EDWARD J. GORIN,

*Appellants,*

v.

JOHN G. HEIMANN, Superintendent of Banks  
of the State of New York,

*Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

**MOTION TO DISMISS OR AFFIRM**

Appellants appeal from that portion of the unanimous judgment of the United States District Court for the Southern District of New York (statutory three-judge court), entered on February 28, 1977, declaring New York Banking Law § 268 constitutional under the interstate Privileges and Immunities Clause, Art. IV, § 2, and the Commerce Clause, Art. I, § 8, of the United States Constitution. Appellee moves pursuant to Rule 16 of the Rules of the Supreme Court to affirm the judgment below, or, in the alternative, to dismiss this appeal.

### Statement of the Case

New York Banking Law § 268 limits the sale of savings bank life insurance to state residents and individuals who regularly work in New York. The three-judge district court sustained § 268 against appellants' challenge under the inter-state Privileges and Immunities Clause on the ground that the statute was reasonably related to substantial governmental purposes (described in the court's earlier rejection of appellants' equal protection claim, A. 4a-7a†) and did not "penalize out-of-state citizens for the benefit of in-state citizens." A. 9a, 10a. The district court rejected appellants' Commerce Clause challenge on the ground that the statute did not "affirmatively regulate articles actually in interstate commerce." A. 12a. Drawing on the test enunciated by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the district court found § 268 to be an evenhanded regulation "to effectuate a legitimate [local] public interest," with only "incidental" effects on interstate commerce. *Ibid.* See also *Great Atlantic and Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976).

In this Court, appellants contend that the district court misinterpreted *Toomer v. Witsell*, 334 U.S. 385 (1948), and *Austin v. New Hampshire*, 420 U.S. 656 (1975), in rejecting their Privileges and Immunities claim and *Great Atlantic and Pacific Tea Co., Inc. v. Cottrell*, *supra*, in rejecting their Commerce Clause claim. Jurisdictional Statement, pp. 9-12.

† References prefixed by the letter "A" refer to the Appendix to the Jurisdictional Statement filed on this appeal.

### Appellants Do Not Present Any Claim Which Warrants Plenary Consideration By This Court.

#### A. The Interstate Privileges and Immunities Clause. Art. IV, § 2.

Appellants' Privileges and Immunities claim is met with the threshold deficiency that the statute sought to be invalidated does not adopt state citizenship, or, even state residence, as a classifying criterion. See *La Tourette v. McMaster*, 248 U.S. 465, 469-70 (1919). Section 268 makes savings bank life insurance ("SBLI") available to anyone who regularly works in New York regardless of his state citizenship on the same terms as it is made available to New York citizens.

Assuming the applicability of the Privileges and Immunities Clause *arguendo*, the validity of § 268 is easily demonstrated. As this Court stated in *Toomer v. Witsell*, *supra* at 396, the Privileges and Immunities Clause bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." (Emphasis added.) Inquiry must be made in each case "with due regard for the principle that the States should have considerable leeway in analyzing local evils, and in prescribing appropriate cures." *Ibid.* The district court made this specific inquiry, finding that § 268 was related to New York's substantial interests in regulating savings banks as local institutions, protecting savings banks and their "consumers" from permitting life insurance activities to prosper to the detriment of traditional banking functions, fairly allocating competition so that both the life insurance industry and the savings banks remain economically viable and enhancing the financial security of those who have an established

nexus with the state. A. 6a-7a, 9a.\* The district court further found that the "mere fact" that certain out-of-state citizens were excluded by § 268 had nothing to do with the classification. A. 8a-9a, 22a n. 10.

*Austin v. New Hampshire*, *supra*, is not opposed. The overwhelming fact in that case was that the state imposed tax fell exclusively on the incomes of non-residents. 420 U. S. at 661, 665, 667 n.12. Herein, the out-of-state citizen and the in-state citizen are simply required to "be" in New York in some relevant sense, and both pay the same price for SBLI. The fact that an unqualified out-of-state citizen cannot obtain New York SBLI does affect, or "penalize," him any more than the limitations on his access to other state benefits which this Court has previously sustained. See e.g. *Spatt v. New York*, 361 F. Supp. 1048 (E.D.N.Y. 1973), *aff'd* 414 U.S. 1058 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd* 401 U.S. 985 (1971), all involving economic preferences for in-state residents pursuing higher education. Accord, *American Commuters Assoc. Inc. v. Levitt*, 279 F. Supp. 40 (S.D.N.Y. 1967), *aff'd* 405 F.2d 1148 (2d Cir. 1969), sustaining economic preferences for New York residents under Privileges and Immunities Clause.

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\* Appellants challenge the district court's acceptance of these state interests on two grounds: the court ignored a pertinent stipulation between the parties and the interests are hypothetical. Jurisdictional Statement, pp. 9-10. The referenced stipulation, entered into by the Assistant previously assigned to the case on behalf of appellee Heiman's predecessor in office, Superintendent Albright, stated, in substance, that Superintendent Albright had no personal knowledge of the legislative purposes served by § 268. It was, therefore, properly discounted by the district court. With respect to alleged hypothetical nature of the state interests involved, appellant fails to advise the Court that there was an extensive record before the district court supporting these (and additional) state interests. That record is only briefly referenced in the opinion at A. 22a n. 12 and n. 13. Moreover, the relevant test of reasonableness does not require factual demonstration but is that established by this Court in *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) and related cases as the district court found (A. 5a-7a).

## B. The Interstate Commerce Clause. Art. I, § 8.

The regulation of the savings bank-policyholder relationship encompassed in § 268 is outside the purview of the Commerce Clause. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15; *Prudential Insurance Company v. Benjamin*, 328 U.S. 408 (1946); opinion of the district court, A. 11a.

Assuming the applicability of the Commerce Clause *arguendo*, § 268 is valid under that Clause for substantially the same reasons it is valid under the Privileges and Immunities Clause.\* We note initially, however, that even if SBLI is an article of commerce, it is not an article *in* interstate commerce. Rather, it is the force of appellants' position in this lawsuit that SBLI ought to be in interstate commerce. Appellee's research has not disclosed any authority for the proposition that the Commerce Clause affirmatively requires a state, or private manufacturer, to place an article into interstate commerce. Compare *Great Atlantic and Pacific Tea Co., Inc. v. Cottrell*, *supra* (Mississippi restrictions on "incoming" Louisiana Milk invalidated). In reaching the "merits" of the Commerce Clause claim, the district court applied the standards established by this Court in *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970) and *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960). Opinion of the district court, A. 12a. Appellant does not dispute the appropriateness of these standards but differs only with the court's assessment of the substantiality and local nature of the supporting state interests. As discussed above, pp. 3-4, there is no basis for the assignment of error in this regard.

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\* The district court assumed the McCarran-Ferguson Act was not applicable for purposes of its disposition. A. 11a-13a. Compare Jurisdictional Statement, p. 9 n. 7.

**CONCLUSION**

**For the foregoing reasons, this appeal should be dismissed or the judgment below affirmed.**

Dated: New York, New York  
August 22, 1977.

Respectfully submitted,

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MICHAEL RODAN, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

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**No. 76-1608**

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**CONSUMERS UNION OF THE UNITED STATES, INC.  
and EDWARD J. GORIN,**

*Appellants,*

v.

**MURIEL SIEBERT, Superintendent of Banks  
of the State of New York,**

*Appellee.*

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

---

**APPELLANTS' OPPOSITION TO APPELLEE'S MOTION  
TO DISMISS OR AFFIRM**

---

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

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**No. 76-1606**

---

**CONSUMERS UNION OF THE UNITED STATES, INC.  
and EDWARD J. GORIN,**

*Appellants,*

v.

**MURIEL SIEBERT, Superintendent of Banks  
of the State of New York,<sup>1</sup>**

*Appellee.*

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

---

**APPELLANTS' OPPOSITION TO APPELLEE'S MOTION  
TO DISMISS OR AFFIRM**

---

Appellants have challenged the constitutionality of Section 268 of the Banking Law of New York (McKinney 1971), under the Commerce Clause, Art. I, § 3 and the Privileges and Immunities Clause of Art. IV, § 2 of the

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<sup>1</sup> Muriel Siebert is substituted as appellee for John G. Heimann pursuant to Rule 48(3) of the Rules of the Supreme Court.

U.S. Constitution. Section 268 prohibits the sale of savings bank life insurance ("SBLI") by New York savings institutions to non-residents of New York who do not regularly work in New York.<sup>2</sup>

#### A. Commerce Clause Art. I, § 3

Appellee contends that Section 268 is constitutional because "... the Commerce Clause [does not] affirmatively [require] a state, or private manufacturer, to place an article in interstate commerce."<sup>3</sup> This statement misconstrues the issue. Appellants do not argue that New York must place SBLI into interstate commerce, merely that New York cannot prevent SBLI from naturally flowing into interstate commerce. "... [T]he very purpose of the Commerce Clause was to create an area of free trade among the states." *Great Atlantic and Pacific Tea Company v. Cottrell*, 424 U.S. 366, 370 (1976). Accordingly, state export embargoes have consistently been struck down by the Court as an impermissible means to safeguard state interests.<sup>4</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (export embargo on unpackaged cantaloupes); *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949) (milk); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928) (unprocessed shrimp); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (natural gas); *West v. Kansas Natural*

<sup>2</sup> Section 268 is quoted in Appellants' Jurisdictional Statement at 2.

<sup>3</sup> Appellee's Motion to Dismiss or Affirm at 3 (hereinafter, Appellee's Motion).

<sup>4</sup> Likewise, state import prohibitions have been treated with disfavor by the Court, e.g. *Great Atlantic & Pacific Tea Co. v. Cottrell*, *supra*, *Brimmer v. Rebman*, 138 U.S. 78 (1891).

*Gas Co.*, 221 U.S. 229, 255 (1911) (natural gas).<sup>5</sup> Cf., *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925) (grain); *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922). Thus while New York can regulate SBLI to accomplish local objectives, these objectives cannot be accomplished through an export embargo.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1115, does not change this result.<sup>6</sup> In interpreting a similar provision in the Natural Gas Act, 15 U.S.C. § 717, the Court in *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 522-523 (1947) said:

For itself, the company asserts that state regulation of prices and service will amount to a power of blocking the commerce or impeding its free flow . . . State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided. It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interest on which the power rests.

Congress has not expressly given the states the power to destroy interstate commerce in life insurance through an embargo. The McCarran-Ferguson Act gave the states no more power to regulate the business of insurance beyond what they possessed prior to the *South-Eastern Underwrit-*

<sup>5</sup> See generally *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186-187 (1950), where the Court said that state regulation cannot, "... discriminate against or place an embargo on interstate commerce. . ." [Emphasis added]

<sup>6</sup> The district court assumed *arguendo* that the McCarran-Ferguson Act was inapplicable. App. 11a-12a.

ers case.<sup>7</sup> See *S.E.C. v. National Securities Inc.*, 393 U.S. 453, 459 (1969), *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962). As previously noted, states cannot place embargoes on interstate commerce. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), relied upon by appellee,<sup>8</sup> did not involve an embargo on interstate commerce and, therefore, did not reach the issue in this case. Cf., *F.T.C. v. Travelers Health Association*, 362 U.S. 293, 300 (1960).

#### B. Privileges and Immunities Clause, Art. IV, § 2

Appellee contends that Section 268 does not transgress the Privilege and Immunities Clause, Art. VI, § 2, because it does not adopt state citizenship or residency as a classifying criterion.<sup>9</sup> However, residency clearly is the classifying criterion. The statute limits the sale of SBLI insurance to residents of New York and one class of non-residents, i.e. those who regularly work in New York. The state cannot neatly avoid the requirements of the Privileges and Immunities Clause merely by including one class of non-residents within the state. The clear thrust of Section 268 is to discriminate against non-residents of New York.

Further, the appellee would have the Court tie itself to a mechanical rule that any state statute is constitutional which adopts residence and not citizenship as the classify-

<sup>7</sup> *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944).

<sup>8</sup> Appellee's Motion at 5.

<sup>9</sup> See Appellee's Motion at 3-4.

ing criterion.<sup>10</sup> This Court has never found itself bound by such a rule. See, for example, *Doe v. Bolton*, 410 U.S. 179 (1973), *Toomer v. Witsell*, 334 U.S. 385 (1948). The clear meaning and effect of Section 268 is to discriminate against non-citizens of New York. Therefore the statute is unconstitutional.

Appellee contends that the district court's justifications of Section 268 satisfy the test for the Privileges and Immunities Clause.<sup>11</sup> The district court found that the statute was adopted as a means to limit the life insurance business of savings institutions, to provide a benefit to those with an economic nexus to the state, and to preserve the local character of savings institutions. App. 6a-7a. These justifications do not withstand scrutiny.

In *Toomer v. Witsell*, *supra* at 398, the Court said that discrimination against non-citizens is impermissible, "... unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." Non-residents of New York will not uniquely cause an imbalance within the savings institutions of insurance business over savings business. The same imbalance could be caused by excess insurance business from New York residents. Thus, this justification cannot support the discrimination in the statute.

Similarly, since SBLI is not supported by the state treasury,<sup>12</sup> the state cannot discriminate in favor of those who make a contribution to the state fisc. The Privileges and Immunities Clause protects not only those who enter

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> See App. 6a.

the state to ply a trade but also those who enter the state seeking the services available there. *Doe v. Bolton*, 410 U.S. 179, 200 (1973). The lack of taxpayer contribution to SBLI distinguishes this case from those which uphold residency restrictions on state-financed educational services.<sup>13</sup> *Cf., Toomer v. Witsell, supra.*

The last justification is the most contrived. The purchase of SBLI by non-residents does not seriously threaten the local character of savings institutions. More importantly, there is nothing in the New York Banking Law or in the record of this case which indicates that New York is attempting to preserve the local character of its savings institutions. No such goal is listed in the Declaration of Policy, N.Y. Bank. Law § 10, nor does any other provision of the statute appear to be aimed at accomplishing this goal. There are no residency restrictions on creditors, depositors or members of savings institutions, N.Y. Bank. Law §§ 234, 237, 378, and loans and investments by the savings institutions are not limited geographically to New York, N.Y. Bank. Law §§ 235, 380. Thus, the most important functions of savings institutions are not similarly restricted to New York residents. Further, appellee stipulated in the district court as to a lack of any knowledge concerning the legislative purpose of Section 268.<sup>14</sup> This justification must be dismissed as illusory.

<sup>13</sup> See Appellee's Motion at 4.

<sup>14</sup> Appellee contends that it was proper for the district court to have ignored this stipulation because it related only to the personal knowledge of the Superintendent of Banks. However, the Superintendent is the official responsible for administration of the statutes. Appellee fails to explain how it has been possible for the various New York Superintendents of Banks to enforce the alleged "local" purpose of the Act without being aware of such a purpose.

The justifications conjured up by the district court are not sufficient to overcome the constitutional prohibition against discrimination in the Privileges and Immunities Clause. The statute, therefore, should be declared unconstitutional.

## CONCLUSION

The foregoing considered, the Court should note probable jurisdiction and give plenary consideration to this case.

Respectfully submitted,

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